CHAPTER 5

Towards a New Extraterritoriality of EU Sanctions?

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1 Introduction

Since the early 1980s, the European Union (EU) – then referred to as the European Communities (EC) – has condemned through various political pronouncements and legal acts the effects of the extraterritorial application of certain foreign laws (to this date only adopted by the US). Seeking to standardize its approach to restrictive measures (EU sanctions), the Council of the European Union (the Council of the EU), the EU institution competent to adopt sanctions, published for the first time in 2003 its 'Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy' (Sanctions Guidelines).[1] Under the heading 'Jurisdiction,' the 2003 Guidelines noted that the EU 'will refrain from adopting legislative instruments having extra-territorial application in breach of international law.'[2] It introduced a form of commitment to exercise jurisdictional self-restraint when adopting EU sanctions.

That principle became a cornerstone of EU sanctions policy. In May 2018, the Council of the EU published an update of its 'Sanctions Guidelines,'[3] an instrument designed *inter alia* to 'present standard wording and common definitions that may be used in the legal instruments implementing restrictive measures.'[4] Interestingly, fifteen years after the first edition, the 2018 Guidelines similarly laid out as a guiding principle that 'the EU will refrain from

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1 Council of the EU, 'Guidelines on Implementation and Evaluation of Restrictive Measures (Sanctions) in the Framework of the EU Common Foreign and Security Policy' (3 December 2003) <https://data.consilium.europa.eu/doc/document/ST%2015579%202003%20INIT/EN/pdf> accessed 4 February 2024.

2 Ibid para 37.

3 Council of the EU, 'Guidelines on Implementation and Evaluation of Restrictive Measures (Sanctions) in the Framework of the EU Common Foreign and Security Policy' (4 May 2018)<https://data.consilium.europa.eu/doc/document/ST-5664-2018-INIT/en/pd>accessed 4 February 2024.

4 Ibid para 1.

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adopting legislative instruments having extra-territorial application in breach of international law.'[5] It also reaffirmed, referring to certain US extraterritorial sanctions, that it has 'condemned the extra-territorial application of third country's legislation imposing restrictive measures which purports to regulate the activities of natural and legal persons under the jurisdiction of the Member States of the European Union, as being in violation of international law.'[6]

Articulating the EU's position on the question, in October 2021, the EU's High Representative of the Union for Foreign Affairs and Security Policy stated that 'the EU has always been firm and vocal in condemning any extraterritorial application of sanctions.'[7] He added that the EU 'also oppose the growing use of secondary sanctions, as well as the use of sanctions as a trade and economic tool. For the EU, sanctions are exclusively a foreign policy tool. And in any event, they must respect international law.'[8]

In light of the Council of the EU's guidelines and 'firm and vocal' pronouncements,[9] does this principled position still reflect EU practice? The time seems ripe to evaluate the meaning of these statements and whether they fairly reflect current approaches to EU sanctions. Indeed, they can be interpreted not as a blanket condemnation of extraterritoriality, as they imply that there could be extraterritorial measures that are not 'in breach of international law.' They also deserve to be examined considering new developments in EU law and, more particularly, the Council's restrictive measures adopted to tackle global issues (human rights and possibly corruption in the future) as well as those imposed in the context of Russia's invasion of Ukraine.

This chapter takes a look back at the road travelled on this question and seeks to show that a transition has begun. In this chapter, which primarily focuses on the application of EU restrictive measures, the concept of extraterritoriality will be understood in a narrow jurisdictional sense as the application of rules (jurisdiction to prescribe or jurisdiction to adjudicate) to a situation or conduct occurring abroad and not involving nationals – therefore a situation

5 Ibid para 52.

6 Ibid.

7 The Diplomaric Service of the EU, 'Jacques Delors Institute. Remarks by HR/VP Josep Borrell at Seminar on Extra-Territorial Sanctions' (*European Union External Action*, 7 October 2021) <https://www.eeas.europa.eu/eeas/jacques-delors-institute-remarks-hrvp-josep-borrell-seminar-extra-territorial-sanctions_en> accessed 4 February 2024.

8 Ibid.

9 Delegation of the European Union to Ukraine, 'Some Clarifications on the Circumvention of EU Sanctions against Russia' (22 May 2023) <https://www.eeas.europa.eu/delegations/ukraine/some-clarifications-circumvention-eu-sanctions-against-russia_en?s=232> accessed 4 February 2024.

for which, at least seemingly, there is no territorial or personal jurisdiction.[10] The exercise of extraterritorial jurisdiction for enforcement purposes, as well as instances of universal criminal and civil jurisdiction, will not be addressed.[11] Additionally, the approach to extraterritoriality in this chapter will differ from the broader perspectives often found in scholarly discussions relating to the EU's objective of influencing the global marketplace, a phenomenon often termed the 'Brussels effect'[12] and on the ways in which EU law is used as an instrument of EU external relations.[13]

This chapter is structured into three parts. Firstly, it seeks to elucidate the EU's original position on the concept of extraterritoriality, particularly in the context of sanctions. This includes the EU's role as a recipient of other states' extraterritorial measures and taking defensive actions in response to them, or as a party imposing sanctions on others. Even before the imposition of restrictive measures following Russia's invasion of Ukraine and despite seemingly clear international law principles in the EU's discourse, the EU's approach was more nuanced and somewhat ambiguous. Secondly, this chapter examines the forces that pull the EU towards more extraterritoriality. Several new factors, particularly in the context of the EU's sanctions imposed against Russia, suggest that the EU has somewhat departed from its original, principled position. Thirdly, in its concluding remarks, it will suggest these trends are not necessarily in tension. The chapter takes a look at some of the distinctive characteristics of these new EU restrictive measures and examines whether they are justified under international law.

2 The (Somewhat Ambiguous) EU Stance on the Extraterritoriality of Sanctions

While, as will be discussed later, the EU has implemented some form of extraterritoriality in its sanctions, it has consistently emphasized the need to adhere

10 Régis Bismuth, 'Pour une appréhension nuancée de l'extraterritorialité du droit américain - Quelques réflexions autour des procédures et sanctions visant Alstom et BNP Paribas' (2016) 61 Annuaire Français de Droit International 785, 790.

11 On these aspects, see Lena Hornkohl, 'The Extraterritorial Application of Statutes and Regulations in EU Law' [2022] Max Planck Institute Luxembourg for Procedural Law Research Paper Series 9.

12 Anu Bradford, *The Brussels Effect: How the European Union Rules the World* (Oxford University Press 2020).

13 Marise Cremona and Joanne Scott (eds), *EU Law beyond EU Borders: The Extraterritorial Reach of EU Law* (1st edn, Oxford University Press 2019).

to international law principles regarding State jurisdiction, both in its role as a norm-maker and as an addressee of the extraterritorial actions of third states. This position has become especially clear in the realm of sanctions, particularly when the EU and its Member States confronted the broad scope of US unilateral economic sanctions. They firmly denounced the US's extraterritorial application of these sanctions, referring to international law principles on State jurisdiction.

2.1 *As a Potential Target of US Extraterritorial Sanctions*

The genesis of the EU's doctrine on extraterritoriality in the field of sanctions is a defensive posture. As early as 1982, the EC strongly responded to the US' measures that prohibited the export of some goods and technology to European companies engaged in the Trans-Siberian Pipeline project with the USSR. Considering that these sanctions were intended to regulate the behaviour of non-US persons abroad, the EC then declared that 'goods and technology do not have any nationality and there are no known rules under international law for using goods or technology situated abroad as a basis of establishing jurisdiction over the persons controlling them.'[14] The principle conveyed in this statement is that States should not exercise a form of personal jurisdiction over objects on the basis of their origin when they are no longer located within the territory of the originating State.

In 1996, the EC made a significant move after the US extraterritorial sanctions against Cuba (under the Helms-Burton Act) and against Libya and Syria (under the D'Amato-Kennedy Act). These sanctions extended to non-US persons in relation to their transactions with these countries. In response, the EC adopted a Blocking Regulation intended to protect against and counteract 'the effects of the extra-territorial application' of US sanctions.[15] More specifically, the Blocking Regulation – which is still in force – stipulates that no judgment or decision enforcing the aforementioned extraterritorial statutes shall be recognized or enforceable within the EU.[16] It also mandates that no person under EU jurisdiction shall comply with these statutes.[17] The list of US extraterritorial sanctions addressed by the regulation was later updated following the

14 European Communities, 'Comments on the US Regulations Concerning Trade with the USSR' (1982) 21 International Legal Materials 891.

15 Council Regulation (EC) No 2271/96 of 22 November 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom [1996] OJ L 309/1. See also Peter Follak's chapter to this volume.

16 Regulation 2271/96 (n 15) Article 4.

17 Regulation 2271/96 (n 15) Article 5(1).

reintroduction of extraterritorial sanctions against Iran. This update occurred after the Trump administration's decision to withdraw from the Iran Nuclear Deal in 2018.[18]

The preamble to the Blocking Regulation explicitly points out that 'by their extra-territorial application, such laws, regulations and other legislative instruments violate international law.'[19] However, the regulation does not provide detailed criteria for determining what constitutes unlawful extraterritoriality. Neither does the Court of Justice of the European Union (CJEU). In its decision in *Bank Melli Iran*, when interpreting certain provisions of the Blocking Regulation, it simply noted that these US extraterritorial laws 'seek to govern activities of natural and legal persons which fall within the jurisdiction of the Member States.'[20]

Details regarding the criteria for unlawful extraterritoriality are elucidated in the diplomatic correspondence between EU and US institutions, specifically concerning the Helms-Burton Act related to Cuba. The EU stated that 'the extraterritorial extension of US jurisdiction is unacceptable as a matter of law and policy' and more specifically that the US 'has no basis in international law to claim the right to regulate in any way transactions taking place outside the US with Cuba undertaken by subsidiaries of US companies incorporated outside the US.'[21] Consequently, the EU appeared to dismiss foreign capital control as a justifiable factor for applying the law of the State of the parent company to regulate the transactions of its subsidiaries abroad.

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18 Commission Delegated Regulation (EU) 2018/1100 of 6 June 2018 amending the Annex to Council Regulation (EC) No 2271/96 protecting against the effects of extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom [2018] OJ L 199 1/1.

19 Regulation 2271/96 (n 15) Recital 4.

20 Case C-124/20 *Bank Melli Iran v Telekom Deutschland GmbH* [2021] ECLI:EU:C:2021:1035, para 37. For a commentary of the Bank Melli case, see, Cedric Ryngaert, 'Interpreting an Unsatisfactory EU Blocking Statute: Bank Melli Iran' (2023) 60 Common Market Law Review 517; Jan Dunin-Wasowicz and Nicolas Burnichon, 'Collision Avoided? Court of Justice of the European Union Gives Effect to EU Blocking Statute While Offering a Way Out of Conflict with U.S. Secondary Sanctions' (*Compliance & Enforcement*, 2 February 2022) <https://wp.nyu.edu/compliance_enforcement/2022/02/02/collision-avoided-court-of-justice-of-the-european-union-gives-effect-to-eu-blocking-statute-while-offering-a-way-out-of-conflict-with-u-s-secondary-sanctions/> accessed 4 February 2024.

21 'Presidency of the European Union and the European Commission (5 March 1996)' (1996) 35 International Legal Materials 397, 398 (Presidency of the EU and the Commission). See also, Charlotte Beaucillon, 'The European Union's Position and Practice with Regard to Unilateral and Extraterritorial Sanctions' in Charlotte Beaucillon (ed), *Research Handbook on Unilateral and Extraterritorial Sanctions* (Edward Elgar 2021) 121.

Interestingly, both the Blocking Regulation and the diplomatic correspondence make extensive references to the negative impact of these extraterritorial regulations on the interests of the EU.[22] The Blocking Regulation forbids persons under EU jurisdiction from complying with the listed extraterritorial US sanctions, but this prohibition has been rarely enforced,[23] and a waiver may be granted by the European Commission when 'non-compliance would seriously damage their interests or those of the [EU].'[24] Moreover, the EU has exercised some selectivity when condemning – or not reacting to – some US extraterritorial sanctions,[25] for instance, those targeting Russia.[26] The Blocking Regulation only applies to the laws and regulations listed in its annex, and it is not an exhaustive list. It is, therefore, legitimate to question whether the EU's stated reluctance towards extraterritoriality stems from a consistent legal doctrine on extraterritoriality or if it is also influenced by broader policy considerations aimed at safeguarding the EU's economic interests in select relationships.

2.2 *As an Entity Adopting Economic Sanctions*

At first glance, the EU's approach to defining the scope of its restrictive measures appears to align with its position in response to US extraterritorial sanctions. The Council of the EU has indeed underscored in its Sanctions Guidelines that, unlike the US, 'the EU will refrain from adopting legislative instruments having extra-territorial application in breach of international law'[27] and that 'EU restrictive measures should only apply in situations where links exist with

22 Presidency of the EU and the Commission (n 21) 398. See also, Regulation 2271/96 (n 15) Recital 5. See also, Commission Delegated Regulation (EU) 2018/1100 (n 18) (pointing out that some US measures 'have extra-territorial application and cause adverse effects on the interests of the Union.')

23 European Commission, *Report from the Commission to the European Parliament and the Council relating to Article 7(a) of Council Regulation (EC) No 2271/96 ('Blocking Statute')* (COM/2021/535 final, 3 September 2021).

24 Regulation 2271/96 (n 15) Article 5(2). See also Article 4 of Commission Implementing Regulation (EU) 2018/1101 of 3 August 2018 laying down the criteria for the application of the second paragraph of Article 5 of Council Regulation (EC) No 2271/96 [2018] OJ L 199 1/7. For a precedent on that matter, see T-8/21 *IFIC Holding v Commission* [2023] ECLI:EU:T:2023:387. See also, Jan Dunin-Wasowicz, Nicolas Burnichon and Niki Khonkarova Helsing, 'The EU Blocking Statute at a Crossroads' [2022] International Review of Compliance and Business Ethics 32.

25 Cedric Ryngaert, 'Interpreting an Unsatisfactory EU Blocking Statute: Bank Melli Iran' (2023) 60 Common Market Law Review 517, 528.

26 For instance see the Russian-related sanctions of Section 231 and Section 235 of CAATSA (Countering America's Adversaries Through Sanctions Act).

27 Council of the EU (n 3) para 52.

the EU.'[28] In that regard, the standard jurisdictional clause in EU restrictive measures programs provides that they shall apply:

a. within the territory of the Union, including its airspace;
b. on board any aircraft or any vessel under the jurisdiction of a Member State;
c. to any person inside or outside the territory of the Union who is a national of a Member State;
d. to any legal person, entity or body, inside or outside the territory of the Union, which is incorporated or constituted under the law of a Member State;
e. to any legal person, entity or body in respect of any business done in whole or in part within the Union.[29]

At first glance, this standard jurisdictional clause, relying on nationality and territoriality nexus, seems to conform to the canons of international law principles on state jurisdiction. Paragraph (a) is covered by the territorial principle. Paragraphs (b), (c) and (d) may target situations occurring abroad, but insofar as the exercise of prescriptive jurisdiction is at stake, they are covered by the nationality principle.[30]

However, the last paragraph (e) raises certain questions. Thus far, it has not been interpreted by the CJEU, and it remains unclear whether it applies to foreign persons, entities, or bodies solely due to their EU nexus, or if it is because a particular transaction within the scope of the prohibited activities, when carried out by such foreign persons, entities, or bodies, is linked to the territory of EU Member States. The mere presence of this ambiguity regarding the interpretation of paragraph (e) could lead to uncertainties for foreign corporations about whether they are subject to restrictive measures. At the very least, paragraph (e) indicates that the EU may adopt a very broad interpretation of the territorial nexus.

This is further corroborated in other branches of EU law and by the case law of the CJEU.[31] Although EU secondary legislation is, by default, applicable on the territory of EU Member States, this has not precluded the EU from

28 Ibid para 51.

29 Ibid para 88.

30 Tom Ruys and Felipe Rodriguez Silvestre, 'Secondary Sanctions After Russia's Invasion of Ukraine – A Whole New World' in Tom Ruys, Cedric Ryngaert and Felipe Rodriguez Silvestre (eds), *The Cambridge Handbook of Secondary Sanctions and International Law* (Cambridge University Press 2024, forthcoming).

31 Régis Bismuth, 'The European Union Experience of Extraterritoriality: When a (Willing) Victim Has Become a (Soft) Perpetrator' in Austen Parrish and Cedric Ryngaert (eds), *Research Handbook on Extraterritoriality in International Law* (Edward Elgar 2023) 124.

enacting norms that would apply or applying norms to situations occurring beyond the territory of its Member States. The CJEU accepted this possibility but emphasized the necessity of complying with international law principles governing State jurisdiction. As pointed out in *Poulsen* and *Racke*, the EU 'must respect international law in the exercise of its powers 'including international customary law.'[32] This was later reaffirmed in *Air Transport Association of America*. That case concerned the application of the EU emissions trading system to emissions from flights departing from or arriving at airports located within the territory of an EU Member State, including emissions generated by non-EU operators outside the airspace of EU Member States. The Court determined that, under customary international law, the EU had the competence to apply such a mechanism even to non-EU operators for the portion of their flights beyond the EU airspace, due to the territorial nexus established by the – even very brief – physical presence of their aircraft on EU Member States' territory.[33] Interestingly, although this was a central argument put forward by the foreign operators, the Court made no reference to the potential extraterritorial implications of this legislation. Additionally, Advocate General Kokott took a step further by explicitly noting that the scheme did not include 'any extraterritorial provisions.'[34]

Even though envisaging a pure and perfect distinction between territoriality and extraterritoriality is outdated,[35] the concept of extraterritoriality is seemingly considered a curse word in the vocabulary of EU institutions.[36] This likely explains why, instead of acknowledging the extraterritorial nature of some of its practices, for instance in the areas of competition, data protection, and financial markets,[37] EU institutions, often by relying on an extensive interpretation

32 Case C-286/90 *Anklagemyndigheden v Peter Michael Poulsen and Diva Navigation Corp.* [1992] ECLI:EU:C:1992:453, paras 9 and 10; Case C-162/96 *A. Racke GmbH & Co. v Hauptzollamt Mainz* [1998] ECLI:EU:C:1998:293, paras 45 and 46.

33 Case C366/10 *Air Transport Association of America and Others* v *Secretary of State for Energy and Climate Change* [2011] ECLI:EU:C:2011:864, paras 121–130.

34 Case C366/10 *Air Transport Association of America and Others* v *Secretary of State for Energy and Climate Change* [2011] ERC-I 13755, Opinion of Advocate General Kokott, paras 145 and 147.

35 See, Régis Bismuth, 'Au-delà de l'extraterritorialité, une compétence économique' in SFDI (ed), *Extraterritorialités et droit international* (Pedone 2020) 113.

36 See nonetheless, Case C507/13 *United Kingdom v Parliament and Council* [2014] ECLI:EU:C:2014:2394, Opinion of Advocate General Jääskinen, para 41 (pointing out that 'no such principle of international law against extraterritoriality as described in the United Kingdom 's application exists.')

37 Bismuth (n 31) 124.

of the territorial principle,[38] prefer to emphasize the link a situation has with the EU. It is nothing other than the EU Council's stance when it stated in its Sanctions Guidelines that 'EU restrictive measures should only apply in situations where links exist with the EU.'[39] Recent developments suggest, however, that in recent years, there has been a significant leap leading the EU to consider new types of connecting factors, amplifying the geographical reach of its restrictive measures in an unprecedented way.

3 Three Dimensions of the Expanded Territorial Reach of EU Sanctions

Beneath the doctrinal debate on whether EU sanctions, or parts thereof, can be or should be described as having a contentious 'extraterritorial' application, it is crucial to highlight a notable trend that has surfaced in recent years regarding the widening geographical reach of EU sanctions. This new phenomenon has several dimensions. At its core, as an instrument of foreign policy, sanctions are intended to produce external effects. EU sanctions law impacts targets or has effects abroad. However, the fact that EU sanctions now reach new targets or geographies, does not necessarily imply that they have become extraterritorial in the same manner as the US extraterritorial sanctions previously condemned by the EU. These developments nonetheless raise the question of whether the absolute assertion that EU sanctions are never extraterritorial should not be nuanced.

Russia's full-scale invasion of Ukraine and continued war of aggression have forced the EU into a new age of sanctions policy and implementation.[40] While multiple factors related to the EU's sanctions policy against Russia have specifically pushed that trend (such as the role of third parties, Iranian or Belarus entities and individuals among others, supporting Russia, sanctions on select Russian-origin commodities in global supply chains, or the fight against circumvention), that evolution also finds its roots elsewhere. Several developments illustrate the expanded geographic reach of EU sanctions, namely the expanded reach of targeted sanctions (3.1), the new frontiers of sectoral

38 Joanne Scott, 'Extraterritoriality and Territorial Extension in EU Law' (2014) 62 The American Journal of Comparative Law 87.

39 Ibid para 51.

40 Jan Dunin-Wasowicz, 'The Long Arm of EU Sanctions' (*EU Law Live*, 25 October 2022) <https://eulawlive.com/op-ed-the-long-arm-of-eu-sanctions-by-jan-dunin-wasowicz> accessed 4 February 2024.

sanctions (3.2), and the potential extraterritorial effects of compliance requirements (3.3).

3.1 *The Expanded Reach of Targeted Sanctions*

As of early 2024, the EU had approximately 40 sanction programs in place. These sanction programs allow the EU Council, among other things, to impose targeted sanctions on individuals or entities. They are traditionally referred to as asset freeze and travel ban measures for individuals. These programs and related individual sanctions are adopted for a variety of reasons and policy objectives. Whereas in the early years of its sanctions policy, the EU primarily adopted sanctions to implement measures adopted by the United Nations, it has increasingly adopted 'autonomous' legal frameworks to pursue its own foreign policy objectives. A significant factor driving the expansion of the reach of EU sanctions is the growing spectrum of policy reasons for which the EU decides to adopt sanctions. Fundamentally, the extended reach of EU sanctions is supported by a clear will to exercise influence on the global stage.[41]

3.1.1 Country-Based EU Sanctions Programs

Traditionally, EU's targeted sanctions are adopted to respond to a particular situation giving rise to the EU's willingness to take action in view of events or issues in a given country. That situation is commonly referred to as 'country-based' sanctions programs. For instance, in January 2024, the EU adopted an autonomous legal framework to impose sanctions in view of the persistent attempts to nullify the democratic results of Guatemala's general and presidential elections.[42] That program allows the imposition of sanctions on individuals and entities, as well as a travel ban for individuals, deemed responsible for actions that undermine democracy, the rule of law and a peaceful transfer of power in Guatemala, including through persecution or intimidation of public officials, democratically-elected authorities, civil society, media and judicial operators among others, as well as through financial misconduct concerning public funds and the unauthorized export of capital.

Are sanctions targeting individuals or entities in countries beyond the EU extra-territorial? While by definition, the targets of these country-based sanctions programs are in locations outside of the EU, the subjects of the prohibition

41 Ibid.

42 See Council Decision (CFSP) 2024/254 of 12 January 2024 concerning restrictive measures in view of the situation in Guatemala and Council Regulation (EU) 2024/287 of 12 January 2024 concerning restrictive measures in view of the situation in Guatemala (not yet published in the Official Journal of the European Union).

that these sanctions introduce, that is, those required to comply with the sanctions, are subject to EU jurisdiction pursuant to the aforementioned standard jurisdictional clause.[43] In *Venezuela v. Council*, Venezuela challenged the sanctions adopted by the Council against it.[44] It argued, among other things, that EU sanctions produce effects in its territory, that is to say, outside the territory of the Union.[45] Venezuela argued before the General Court that both the assessment of the situation in Venezuela, which the Council carried out in seeking to establish whether there were human rights violations, and the effects of the measures adopted following that assessment involve exercising illegal extraterritorial jurisdiction.[46] However, the General Court rejected the argument relied on by Venezuela alleging exercise, by the Council, of extraterritorial jurisdiction.[47] The General Court noted that 'as the Council rightly contends, as is apparent from Article 20 of the contested regulation, … the restrictive measures at issue concern persons and situations falling within the jurisdiction of the Member States *ratione loci* or *ratione personae*.'[48]

3.1.2 Theme-Based EU Sanctions Programs

Parallel to the use of country-based sanction programs, the EU has adopted another type of sanction programs, the main objective of which is to address a threat, a transnational problem or a topic. Such programs can address, among other things, the proliferation of chemical weapons,[49] cyber-attacks,[50] terrorism, or serious human rights violations. These are commonly referred to as 'theme-based' sanction programs.

Perhaps most illustrative of the EU's readiness to impose sanctions on actors – irrespective of their location or degree of connection to the EU to

43 See *supra* Section 2.2.

44 Council Regulation (EU) 2017/2063 of 13 November 2017 concerning restrictive measures in view of the situation in Venezuela [2017] OJ L 295/21.

45 Case T-65/18 *Bolivarian Republic of Venezuela v Council* [2023] ECLI:EU:T:2023:529, para 109.

46 Ibid.

47 Ibid para. 111.

48 Ibid.

49 Council Decision (CFSP) 2018/1544 of 15 October 2018 concerning restrictive measures against the proliferation and use of chemical weapons [2018] OJ L 259/25; Council Regulation (EU) 2018/1542 of 15 October 2018 concerning restrictive measures against the proliferation and use of chemical weapons [2018] OJ L 259/12.

50 Council Decision (CFSP) 2019/797 of 17 May 2019 concerning restrictive measures against cyber-attacks threatening the Union or its Member States [2019] OJ LI 129/13; Council Regulation (EU) 2019/796 of 17 May 2019 concerning restrictive measures against cyber-attacks threatening the Union or its Member States [2019] OJ LI 129/1.

advance vital policy goals – is the Global Human Rights Sanctions Regime (GHRSR).[51] Since December 2020, the GHRSR has allowed the EU to impose sanctions on individuals and entities responsible for a very broad range of serious human rights violations. By definition, this program allows the imposition of sanctions on individuals and entities anywhere in the world. To date, sanctions have been imposed using that legal instrument on entities and individuals located in several countries.

3.1.3 Fighting Circumvention and Facilitation through Individual Sanctions

The EU has recently adopted various designation criteria to impose individual sanctions on third-party actors, in the case of the sanctions against Russia, who facilitate circumvention or otherwise significantly frustrate EU sanctions. It is not the first time that EU sanctions have provided a legal basis to tackle circumvention or facilitation through designations. For instance, under the Belarus sanctions program, the Council may sanction natural or legal persons, entities or bodies who 'facilitate … the transfer of prohibited goods and the illegal transfer of restricted goods … into the territory of the Union.'[52] Under the North Korea sanctions program, the Council may designate 'persons assisting in the evasion of sanctions or violating the provisions of the regulation.'[53] However, the recent challenges presented by the fight against the circumvention of sanctions against Russia[54] and the complexity of the illicit networks supporting Hamas and the Palestine Islamic Jihad have put these objectives in a new context.

Under Article 3(h) of Council Regulation 269/2014, the EU Council may impose sanctions against natural or legal persons, entities or bodies for: '(i) facilitating infringements of the prohibition against circumvention of EU sanctions against Russia or (ii) otherwise significantly frustrating those provisions.'

51 Council Decision (CFSP) 2020/1999 of 7 December 2020 concerning restrictive measures against serious human rights violations and abuses [2020] OJ LI 410/13.

52 Article 2(6)(a)(ii) of Council Regulation (EC) No 765/2006 of 18 May 2006 added by Council Regulation (EU) 2021/1985 of 15 November 2021 amending Regulation (EC) No 765/2006 concerning restrictive measures in respect of Belarus [2021] OJ L 405/1.

53 Article 34(5) of Council Regulation (EU) 2017/1509 of 30 August 2017 concerning restrictive measures against the Democratic People's Republic of Korea and repealing Regulation (EC) No 329/2007 [2017] OJ L 224/1.

54 Jan Dunin-Wasowicz and Gonzalo Saiz, 'Time to Act: Deploying the Full Potential of EU Sanctions against Facilitators of Circumvention' (*RUSI Commentary*, 7 February 2024) <https://rusi.org/explore-our-research/publications/commentary/time-act-mobilising-eu-sanctions-against-facilitators-circumvention> accessed 8 February 2024.

When it introduced these new legal grounds on 23 June 2023, the Council specifically noted that circumventing EU sanctions against Russia or otherwise 'significantly frustrating' sanctions by third-country operators may undermine the purpose and the effectiveness of EU sanctions.[55] An initial version of this provision provided for the possibility to impose sanctions on any 'natural or legal persons, entities or bodies facilitating infringements of the prohibition against circumvention'[56] of the regulation and other restrictive measures concerning Russia. At first glance, the target of the sanction would need to have some EU nexus to facilitate circumvention (if, for instance, a third party buys sanctioned goods in the EU, takes them to a third country and then exports them to Russia or if an EU national is involved).

Revised with the 11th package of EU sanctions against Russia, this criterion now goes further. Setting its foreign policy objective to crack down on circumvention, the Council noted in its decision that 'indications of cases of frustrating' EU sanctions include, inter alia, 'the fact that the main activity of a third country operator consists of purchasing restricted goods in the Union that reach Russia, the involvement of Russian persons or entities at any stage, the recent creation of a company for purposes related to restricted goods reaching Russia, or a drastic increase in the turnover of a third-country operator involved in such activities.'[57]

To date, designations on these grounds have been limited in number and reach. The Council sanctioned SPS CJSC on 'frustration of sanctions' grounds. The Council noted that SPS CJSC, a Russia-based entity that manufactures computers and other electronic equipment, was actively involved in circumventing sanctions through its partnership with an EU-based entity, namely Woerd-Tech BV.[58] The Netherlands-based Woerd-Tech BV was suspected of illegally smuggling semiconductors into Russia and the owner was arrested

55 Recital, para 4 of Council Decision (CFSP) 2023/1218 of 23 June 2023 amending Decision 2014/145/CFSP concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine [2023] OJ LI 159/526.

56 Article 1 of Council Regulation (EU) 2022/1905 of 6 October 2022 amending Regulation (EU) No 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine [2022] OJ LI 259/76.

57 Recital, para 2 of Council Regulation (EU) 2023/1215 of 23 June 2023 amending Regulation (EU) No 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine [2023] OJ LI 159/330.

58 See Annex of Council Implementing Regulation (EU) 2023/1216 of 23 June 2023 implementing Regulation (EU) No 269/2014 concerning restrictive measures in respect of

by the competent Dutch authority on suspicion of sanctions circumvention, with SPS CJSC functioning as a 'key facilitator.'[59] In the 12th package, the Council sanctioned a French national on facilitation grounds for using two Finnish companies (Siberica Oy and Luminor Oy) to export sanctioned products to Russia. The Council noted as a justification that the individual is being prosecuted by Finnish authorities for violating EU sanctions.[60] The EU also sanctioned two Russian entities (LLC Mayak and AK Microtech) and one of their managers on frustration of sanctions grounds (for running through parallel import schemes).[61]

Another illustration is the sanctions program adopted in January 2024 establishing restrictive measures against those who support, facilitate or enable violent actions by Hamas and the Palestinian Islamic Jihad.[62] In view of the gravity of the 7 October 2023 attacks against Israel, the Council decided on 19 January 2024 to establish a dedicated framework of restrictive measures against those who support, facilitate or enable violent actions by Hamas and the Palestinian Islamic Jihad (PIJ). The program allows the EU to impose sanctions on the 'sponsors of the sponsors' of such acts, wherever they are in the world.[63] The restrictive measures consist of an asset freeze and a prohibition to make funds and economic resources available for the listed individuals and entities, as well as a travel ban for the individuals. Under the regime, the EU may, inter alia, target those who support, materially or financially, Hamas or the PIJ, as well as those who participate in the planning, preparation or enabling of violent

actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine [2023] OJ LI 159/335.

59 Ibid.

60 See Annex of Council Implementing Regulation (EU) 2023/2875 of 18 December 2023 implementing Regulation (EU) No 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine (not yet published in the Official Journal of the European Union).

61 Ibid.

62 Council Decision (CFSP) 2024/385 of 19 January 2024 establishing restrictive measures against those who support, facilitate or enable violent actions by Hamas and the Palestinian Islamic Jihad; Council Regulation (EU) 2024/386 of 19 January 2024 establishing restrictive measures against those who support, facilitate or enable violent actions by Hamas and the Palestinian Islamic Jihad (not yet published in the Official Journal of the European Union).

63 Council of the EU, 'Hamas and Palestinian Islamic Jihad: Council Establishes Dedicated Sanctions Framework and Lists Six Individuals' (10 January 2024) <https://www.consilium.europa.eu/en/press/press-releases/2024/01/19/hamas-and-palestinian-islamic-jihad-council-establishes-dedicated-sanctions-framework-and-lists-six-individuals/> accessed 4 February 2024.

actions by Hamas or the PIJ. When it adopted the program, the EU sanctioned several individuals of various nationalities and places of residence.

While the sanctions imposed to date on anti-circumvention grounds have been limited in both number and reach, these new provisions do not contain any geographic limitation. It may be used on actors registered or located in third countries, such as circumvention hubs. Similarly, the legal basis under the Hamas-PIJ program does not contain any geographic limit, which is understandable given the transnational nature of such illicit networks. Should the EU employ its new anti-circumvention and anti-facilitation mechanisms to extensively target third-state persons or entities for conducting prohibited transactions, it would bear a resemblance to US secondary sanctions. Furthermore, it is crucial to acknowledge that merely the existence of such a possibility might exert a considerable chilling effect on businesses based in third countries.

3.2 *The New Frontiers of Sectoral Sanctions*

Sectoral sanctions imposed against Russia have had effects on third parties and third countries, thus expanding their geographic reach. Many sectoral sanctions imposed against Russia in Regulation 833/2014[64] cover direct and indirect relationships (including third-country touch points).[65] As discussed below, several trade controls prohibit EU operators from trading with non-EU third parties that themselves trade with actors or products that are targeted by EU sanctions. Conversely, these rules are intended to regulate the conduct of these third-country actors as they would not be able to trade with EU operators unless they comply with EU law.

Concerning asset freeze measures, EU operators are prohibited from making funds or economic resources available, directly or indirectly, to sanctioned individuals and entities. In addition, the asset freeze and the prohibition on making funds or economic resources available to those listed extend to any entity that is owned or controlled by the sanctioned person, irrespective of their location.

Financial sanctions likewise prevent EU operators from directly or indirectly purchasing, selling, providing investment services for or assistance in

64 Council Regulation (EU) No 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine [2014] OJ L 229/1. The last consolidated version of the regulation (1 October 2023) is accessible at the following link <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02014R0833-20231001>

65 Among other examples, see, the prohibition on providing insurance and reinsurance, directly or indirectly, in relation to goods listed in Annex XI, Article 3(c)(2) of Regulation 833/2014 (n 64).

the issuance of, or otherwise dealing with certain transferable securities and money-market instruments.[66] The prohibitions to make or be part of certain new loans or credits likewise apply directly and indirectly. The transaction ban (article 5aa) also applies indirectly to entities owned for more than 50% or to a legal person, entity or body acting on behalf or at the direction of an entity in the scope of the prohibition.[67] The scope of the prohibition on accepting deposits from Russian legal persons, entities or bodies extends to those established in third countries and majority-owned by Russian nationals or natural persons residing in Russia.[68]

As another example, it prohibited to invest, participate or otherwise contribute to projects co-financed by the Russian Direct Investment Fund.[69] These projects need not necessarily be in Russia. In addition, the prohibition on investments in Russia's energy and mining sectors covers companies from a third country active in these sectors in Russia. Further, it is prohibited to acquire any new or extend any existing participation in any legal person in a third country operating in the energy sector in Russia.[70] Similarly, it is prohibited to grant or be part of any arrangement to grant any new loan or credit or otherwise provide financing, including equity capital, to any legal person in any other third country operating in the mining and quarrying sector in Russia.[71]

Emblematically, the oil price cap mechanism applies to the maritime transport to third countries of Russian crude oil and other petroleum products and related services. EU operators are only allowed to provide maritime transport and related services for Russian crude oil and petroleum products if these are sold at or below the relevant price caps.

As of 1 January 2024, it is prohibited to purchase, import, or transfer diamonds and products incorporating diamonds listed in Parts A, B, and C of Annex XXXVIIIA if they (i) originate in Russia, (ii) have been exported from Russia into the EU or any third country, or (iii) transited via Russia regardless of their origin. As of 1 March 2024, it will be prohibited to purchase, import, or transfer products listed in Part A of Annex XXXVIIIA (unsorted and non-industrial diamonds), when processed in a third country, consisting of diamonds originating in Russia or exported from Russia with a weight equal to or

66 Regulation 833/2014 (n 64) article 5.
67 Regulation 833/2014 (n 64) article 5aa.
68 Regulation 833/2014 (n 64) Article 5b.
69 Regulation 833/2014 (n 64) Article 2e(3).
70 Regulation 833/2014 (n 64) Article 3a(1)(a).
71 Regulation 833/2014 (n 64) Article 3a(2)(b).

above 1.0 carats per diamond. Finally, As of 1 September 2024, it will be prohibited to purchase, import or transfer products listed in Parts A, B and C of Annex XXXVIIIA, when processed in a third country, consisting of or incorporating diamonds originating in Russia or exported from Russia with a weight equal to or above 0.5 carats or 0.1 grams per diamond.

Concerning dual-use goods and technology and the goods and technologies listed in Annexes II, VII, X, XVI, XVIII, XX, and XXIII of Regulation 833/2014, it is prohibited to sell, supply, transfer or export, directly or indirectly, goods or technology, whether or not originating in the EU, to any natural or legal person, entity or body in Russia or for use in Russia.

Import restrictions on certain iron and steel products generally prohibit EU economic operators from importing, directly or indirectly, these products if they originate in Russia or have been exported from Russia. It is further prohibited to purchase, import, or transfer, directly or indirectly, certain coal and other solid fossil fuels into the EU if they originate in Russia or are exported from Russia. Concerning the goods in Annexes XVII, XXI and XXII, the prohibition on purchase applies irrespective of the destination of the goods. Sanctions concerning gold and steel explicitly reference third countries. It is prohibited to purchase, import, or transfer, directly or indirectly, gold, as listed in Annex XXVI, if it originates in Russia and has been exported from Russia into the EU or to any third country. These restrictions extend to processing activities in third countries that incorporate the prohibited product.

In other words, the application of EU sanctions and export controls, particularly regarding Russia, increasingly requires one to consider factors or actions that occur beyond the EU's borders. The geographic reach of sectoral sanctions, particularly to third-party countries or actors, depends on each measure at hand.

3.3 *The Potential Extraterritorial Effects of Compliance Requirements*

As previously noted,[72] strictly speaking, EU sanctions apply: (i) within the territory of the EU, including its airspace; (ii) on board any aircraft or any vessel under the jurisdiction of a Member State, (iii) to any person inside or outside the territory of the EU who is a national of a Member State; (iv) to any legal person, entity or body, inside or outside the territory of the EU which is incorporated or constituted under the law of a Member State; and (v) to any legal person, entity or body in respect of any business done in whole or in part within the EU. Although EU sanctions generally require either that some

72 See *supra* Section 2.2.

conduct occur in the EU or that an EU entity or person be involved in it, EU law may, in practice, apply well beyond these criteria. Corporate compliance is a significant vector to expand the reach of EU law. EU sanctions legislation does not at present formally require EU operators to implement sanctions compliance programs.[73] However, EU operators need to adopt appropriate measures to comply with EU sanctions, or else they risk exposure to penalties (civil, administrative, or criminal depending on the enforcing Member State) for their violation.[74]

3.3.1 EU Touch Points

EU operators typically begin their compliance efforts – whether they are specific to a proposed transaction or activity under consideration, or more programmatic, in the sense of building a compliance program – by assessing their EU sanctions risks. It is a general principle of compliance that there is no one-size-fits-all sanctions compliance program. While substantial variations may exist between different programs, EU operators should nonetheless be able to follow the same methodology to design and periodically evaluate them. EU sanctions compliance programs should be specifically tailored to the risks to which the EU operator is exposed. This presupposes having clearly identified these risks. Risk mapping is another essential element of building and implementing effective sanctions compliance programs because it informs companies of their potential or actual exposure to EU sanctions risks (and export controls if these are covered in the same exercise). The risk assessment for large companies means identifying relevant EU touchpoints anywhere relevant in the world.

While traditionally, the EU has adopted a rather strict approach to interpreting touch points of bases for jurisdiction; it has recently signalled more expansive views of the question. For instance, in one FAQ, the Commission addressed the following question: 'Are non-EU companies required to comply with EU sanctions when they import agricultural products from Russia? Does it make any difference if those goods transit through the EU territories or the

73 Except for EU exporters of dual-use items who are required to implement an internal compliance programme. As discussed below (Article 12(4) of Regulation (EU) 2021/821 of the European Parliament and of the Council of 20 May 2021 setting up a Union regime for the control of exports, brokering, technical assistance, transit and transfer of dual-use items (recast)). In some cases, sanctions compliance measures derive from anti-money laundering legislation.

74 Jan Dunin-Wasowicz, 'A Framework for Effective EU Sanctions Compliance Programs' [2023] (5) Compliance, Ethics & Sustainability <https://denhollander.info/artikel/17843> accessed 4 February 2024.

Euro is used as a currency for the transaction?'[75] The Commission replied in its FAQ that EU sanctions are never extraterritorial and do not apply to non-EU companies or individuals that do business entirely outside the Union. By way of example, a non-EU company shipping agricultural products from Russia directly to a non-EU country has no obligations vis-à-vis EU sanctions. It continued '[h]owever, if the same company imports the products via the Union *or carries out payments in the Union*, then it has to comply with EU sanctions as it is entering the EU internal market.'[76]

While neither the regulation nor the guidance issued to date goes as far as saying that the use of the euro in a transaction that has no other EU nexus will trigger EU sanctions jurisdiction, in effect, the presence of the euro in a transaction could trigger sanctions jurisdiction because the transaction is deemed for that reason (i) within the territory of the EU or (ii) in respect of any business done in whole or in part within the EU.

Should the EU adopt such a stance, it would mark a significant shift towards a more extensive interpretation of the territorial principle. This would be reminiscent of the controversial US practice of targeting dollar-denominated payments relating to prohibited transactions under US sanctions programmes to the extent that they have been processed through the US financial system, more specifically, through the correspondent banks located in the US.[77] As pointed out by a leading international monetary law expert, monetary sovereignty 'does not entitle a State to exercise any degree of direct control over transactions which involve its currency but which occur abroad and are governed by a foreign system of law'[78] and this remains true 'even though any payment made in respect of that transaction would ultimately have to be reflected by account movements on the clearing system which is operated within that State.'[79]

75 Directorate-General for Financial Stability, Financial Services and Capital Markets Union, 'The Commission Consolidated FAQs on the implementation of Council Regulation No 833/2014 and Council Regulation No 269/2014' (Commission Consolidated FAQs) <https://finance.ec.europa.eu/publications/consolidated-version_en> accessed 4 February 2024.

76 Ibid.

77 See, Tom Ruys and Cedric Ryngaert, 'Secondary Sanctions: A Weapon out of Control? The International Legality of, and European Responses to, US Secondary Sanctions' [2020] British Yearbook of International Law 1, 20; Bismuth (n 10) 796.

78 Charles Proctor, *Mann on the Legal Aspect of Money* (7th edn, Oxford University Press 2012) 535.

79 Ibid.

3.3.2 Parent-Subsidiary Relationships

Provisions against circumvention may also project EU law beyond the rules' initial subject. It is prohibited for EU operators to knowingly and intentionally participate in activities the object or effect of which is to circumvent EU sanctions. The Commission has restated the important application of this principle to parent-subsidiary relationships. It noted that although 'Russian subsidiaries of EU parent companies are incorporated under Russian law, not under the law of a Member State, hence they are not bound by the measures …, it is prohibited for EU parent companies to use their Russian subsidiaries to circumvent the obligations that apply to the EU parent, for instance by delegating to them decisions which run counter the sanctions, or by approving such decisions by the Russian subsidiary.'[80] In other words, because the rule requires some degree of compliance by the non-EU entity with EU law, it, therefore, in practice extends the scope of EU law to entities that are not initially covered. Guidance published by the German national competent authority in April 2024 further illustrates this trend.[81]

3.3.3 Due Diligence and Anti-circumvention Prevention

EU operators are expected to perform risk-based due diligence to identify and deal with their sanctions risk. It is prohibited under EU law to knowingly and intentionally participate in activities the object or effect of which is to circumvent sanctions. With regards to the cumulative requirements of knowledge and intent, the CJEU noted that the two cumulative requirements of knowledge and intent are met where the person participating in an activity covered by the restrictive measures 'deliberately seeks the object or the effect, direct or indirect, of circumvention connected therewith' and 'where the person in question is aware that his participation in such an activity can have that object or effect and accepts that possibility.'[82]

Preventing circumvention through due diligence may require evaluating entities, individuals and proposed transactions and activities in third countries. EU companies have to vet companies in third countries to assess the risk that the goods they may decide to sell to their counterparties in these third countries could be sent onwards to Russia. While the prohibition on circumvention applies to anyone subject to EU law, its implementation necessitates actions beyond the EU. For instance, to mitigate the sanctions risk with a third-party company outside of the EU, the due diligence may require that the counterparty accepts to comply with EU sanctions. In some instances, third parties outside of the EU, even though they are not subject to EU law may voluntarily

80 Commission Consolidated FAQs (n 75).

81 BWK, Sanktionsumgehung – Hinweis: Kriegsrelevante Güter gelangen vermehrt von ausländischen Tochtergesellschaften von EU-Unternehmen nach Russland (24.04.2024).

82 Case C72/11 *Mohsen Afrasiabi, Behzad Sahabi, Heinz Ulrich Kessel* [2011] ERC-I 14285, para 67.

agree to apply EU law. The benefit of keeping a commercial relationship trumps other commercial considerations. Because of the importance of the EU's economy, some third-party operators may decide to 'opt-in' to EU sanctions compliance.

3.3.4 New Compliance Requirements

Various rounds of EU sanctions against Russia have each introduced additional due diligence or compliance requirements. For instance, in the 12th package, the EU introduced an obligation, applicable as of 20 March 2024 (but then also to agreements already in existence), that requires exporters, when selling, supplying, transferring or exporting to a third country certain sensitive goods and technology, to contractually prohibit re-exportation to Russia and for use in Russia.

This requirement thus flows down to contracting parties in third countries not subject to EU sanctions jurisdiction to accept complying with EU law requirements. It is a bit early to assess the practical impact of this prohibition since it was adopted at the time of this contribution. To a certain degree, in principle, the EU depends on the contractual power of corporations under its jurisdiction to impose specific requirements related to EU sanction programs on corporations from third countries. The primary obligation falls on an EU entity; therefore, it does not seem to have an extraterritorial dimension at first glance. However, by utilizing its own corporations as proxies for EU sanction programs, the EU's approach undoubtedly produces an extraterritorial effect.

4 Concluding Remarks

When put into perspective with the positions developed by the EU in the context of US extraterritorial sanctions, the more recent developments in European practice of restrictive measures allow for some general observations.

In the context of its condemnations of American extraterritorial sanctions, the EU primarily emphasized the situation that the rule was intended to govern (a transaction between a sanctioned country and an operator in a third state) rather than on the reason for which the sanctions were imposed (a pure domestic foreign policy objective, a violation of fundamental norms of international law, etc.). Indeed, when looking in detail at the EU's reactions during the precedent of the Trans-Siberian Pipeline project with the USSR in 1982 or in the context of the Helms-Burton and D'Amato-Kennedy laws in 1996, the EU pointed out that 'there are no known rules under international law for using goods or technology situated abroad as a basis of establishing jurisdiction over

the persons controlling them'[83] and that there are 'no basis in international law to claim the right to regulate in any way transactions taking place outside the US with Cuba undertaken by subsidiaries of US companies incorporated outside the US.'[84]

Although the most recent European sanctions against Russia do not necessarily rest exactly on the various criteria that the EU has criticized in the past as regards US practice, it must nevertheless be noted that it has made a gradual shift allowing for the amplification of the geographical scope of these sanctions. The EU criteria are not identical to the US's, but through various tools, they are increasingly approximating them, thus allowing for more and more discipline and influence over transactions between the EU and third countries or between the target country and third countries.

The EU's original position against the application of certain extraterritorial sanctions, as reflected in the EU Blocking Statute, and its recent assertive actions, particularly concerning Russia, need not be in tension. As previously mentioned, the EU has never denounced all extraterritorial sanctions as a violation of international law. To date, it has acted and called out only a certain subset of US sanctions. In fact, the list of US extraterritorial laws that the EU considers illegal from an international law perspective is quite short. The EU has, for instance, not denounced more recent US secondary sanctions against Russia as being violative of international law. Although the political alignment between the US and the EU concerning their sanction programs matters, this suggests that the EU's response was not absolute but rather limited to certain categories of sanctions that have an extraterritorial application.

If it is evident that political considerations related to the protection of its economic interests have led the EU to show a form of selectivity in its condemnations, a legally important aspect should nevertheless not be neglected. A distinction is necessary between US sanctions against Cuba, driven by specific American foreign policy objectives, and EU as well as US sanctions against Russia, enacted in response to the breach of a peremptory norm of general international law. The customary rules on state responsibility require states to refrain from rendering aid or assistance in maintaining a situation created by a serious breach of a peremptory norm of general international law.[85] It is conceivable that the obligation of non-assistance in the event of a violation of a *jus cogens* norm could create a responsibility – or at least a possibility – for states

83 See *supra* Section 2.1.

84 See *supra* Section 2.1.

85 International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, Article 41(2).

to impose restrictive measures on operators from third states that contribute, even indirectly, to perpetuating the situation resulting from this violation.[86] The joint statement in March 2023 by Commission President von der Leyen and President Biden is quite revealing on this point. In their declaration, they stated: 'we are taking new steps together to target additional third-country actors across the globe to disrupt support for Russia's war from any corner of the world where it is identified.'[87]

The EU does not explicitly link the geographical expansion of its restrictive measures to the obligation of non-assistance, instead opting for a broader interpretation of the territorial link. These two aspects do not necessarily contradict each other and, in fact, likely stem from a shared philosophy. Indeed, the obligation of non-assistance in cases where a peremptory norm of general international law is violated could serve as a justification for such extraterritoriality or, more euphemistically, territorial extension of EU restrictive measures. This aligns with the more flexible forms of extraterritoriality that the EU has developed in recent years. These forms extend beyond merely safeguarding the EU market or the rights of EU citizens, as seen in competition or data protection matters, and now venture into protecting norms related to international human rights law or the environment, which are of an *erga omnes* nature.[88]

86 Régis Bismuth, 'The New Frontiers of European Sanctions and the Grey Areas of International Law' (2023) 4 Revue Européenne de Droit 8, 9, 11–12.

87 European Commission, 'Joint Statement by President Biden and President von der Leyen' (10 March 2023) <https://ec.europa.eu/commission/presscorner/detail/fr/statement_23_1613> accessed 4 February 2024.

88 Bismuth (n 31) 128–131.